

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Avista Corporation,)	
)	
The Bonneville Power Administration,)	
)	
Idaho Power Company,)	
)	
The Montana Power Company,)	
)	Docket No. RT01-35-000
Nevada Power Company,)	
)	
PacifiCorp,)	
)	
Portland General Electric Company,)	
)	
Puget Sound Energy, Inc.,)	
)	
Sierra Pacific Power Company)	

**FILING UTILITIES' ANSWER TO MOTIONS TO CONSOLIDATE
AND REQUEST FOR LEAVE TO FILE ANSWER
TO PROTESTS TO THE RTO WEST OCTOBER 23, 2000 FILING**

Pursuant to Rule 213 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2000), the above-captioned parties (collectively, the "Filing Utilities") hereby answer the motions to consolidate, protests, and comments filed in response to the Filing Utilities' Supplemental Compliance Filing and Request for Declaratory Order Pursuant to Order No. 2000, dated October 23, 2000 (the "October

23 Filing’’).¹ The Filing Utilities request waiver of Rule 213 to the extent it would otherwise prohibit an answer to protests and comments.

I. INTRODUCTION

In the October 23 Filing, the Filing Utilities proposed to form RTO West, a regional transmission organization (“RTO”) as described in Order No. 2000.² On October 16, 2000, certain of the Filing Utilities—Avista Corporation, The Montana Power Company, Nevada Power Company, Portland General Electric Company, Puget Sound Energy, Inc., and Sierra Pacific Power Company (the “TransConnect Applicants”)—filed a separate proposal to form an independent transmission company, comprising TransConnect, LLC and TransConnect Corporate Manager, Inc. (“TransConnect”), that would own and operate the interstate transmission assets presently owned and operated by each of the TransConnect Applicants. Each of the TransConnect Applicants has also been actively engaged in the development of RTO West. It is contemplated that TransConnect, LLC will participate as a transmission owner within RTO West.

¹ As is further explained below, this Answer does not address numerous concerns relating to “Stage 2” issues and relating to the now superceded October 23, 2000 versions of the Transmission Operating Agreement and Agreement to Suspend Provisions of Pre-Existing Transmission Agreements. The Filing Utilities will address these issues in later filings when they are ripe for review.

² *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh’g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *review pending sub nom. Pub. Util. Dist. No. 1 of Snohomish Cty., WA v. FERC*, Nos. 00-1174, et al. (D.C. Cir.).

This Answer responds to motions to consolidate the RTO West and TransConnect dockets. The Answer then responds to issues raised in the protests and comments (the “November 20 Comments”) to the October 23 Filing.

II. REQUEST FOR WAIVER

The Filing Utilities recognize that the Commission’s rules do not allow answers to protests or comments. 18 C.F.R. § 385.213(a)(2). However, in certain situations, and for good cause shown, the Commission has permitted such answers when they aid the Commission’s “understanding and resolution of the issues.”³ Applicants believe their answer will assist the Commission in its deliberations and that good cause exists to waive the rule against such answers. Accordingly, the Filing Utilities request the Commission grant waiver and accept their response.

III. ANSWER TO MOTIONS TO CONSOLIDATE

Motions to consolidate the RTO West proceeding in Docket No. RT01-35-000 with the TransConnect proceeding in Docket No. RT01-15-000 were filed by the Northwest

³ See, e.g., *Arizona Public Service Co.*, 93 Fed. Energy Reg. Comm’n Rep. (CCH) ¶ 61,216 (2000), slip op. at 7 (accepting answer because it aids understanding and resolution of issues); *Entergy Nuclear Indian Point 3, LLC*, 92 Fed. Energy Reg. Comm’n Rep. (CCH) ¶ 61,281 at 61,944 (2000) (accepting one answer that assisted in understanding and resolution of issues, but rejecting another answer because no such special circumstances warranting acceptance were present); *International Transmission Co.*, 92 Fed. Energy Reg. Comm’n Rep. (CCH) ¶ 61,276 at 61,912-913 (2000) (accepting one answer that assisted in understanding and resolution of issues, but rejecting other answers as repetitive).

IPPs/Marketers Group (“IPPs/Marketers”) and Powerex Corporation (“Powerex”).⁴ The

IPPs/Marketers assert:

The existence of two concurrent proceedings covering identical or overlapping issues creates the potential for conflicting decisions in the two proceedings, issues falling between the cracks of the proceedings, and interested stakeholders mistakenly believing that it was appropriate for them to address their concerns in one proceeding, only to learn later that they had dedicated their efforts and resources to the wrong proceeding.

(IPPs/Marketers Motion at 15.) The IPPs/Marketers then recommend consolidation or, in the alternative, that the Commission “issue an order as quickly as possible identifying the specific determinations . . . that it intends to make in the context of each proceeding” and “ensure that the pace of the TransConnect proceeding is not permitted to impede the progress of the formation of RTO West.”⁵ Powerex also requests consolidation because they believe common questions of fact and law are presented in both proceedings.⁶

⁴ The Public Interest Organizations (Northwest Energy Coalition; Renewable Northwest Project; Natural Resources Defense Council; and Project for Sustainable FERC Energy Policy) (collectively “PIOs”), did not request consolidation of the TransConnect proceeding with the RTO West proceeding in this docket. However, in the TransConnect docket, the PIOs request consolidation and assert that the “existence of two concurrent proceedings covering identical and overlapping issues makes no sense for the participating parties, and it creates the potential for conflicting decisions.” PIOs Motion at 6, filed in Docket No. RT01-15-000.

⁵ IPPs/Marketers Motion at 15-16.

⁶ Powerex Comments and Motion to Intervene at 4.

Consolidation of the RTO West and TransConnect proceedings will not further the public interest. Rather, the Filing Utilities believe consolidation will unduly complicate both proceedings to the detriment of all parties involved. The IPPs/Marketers and the PIOs correctly note the related nature of RTO West and the TransConnect. These proceedings are, however, far from identical or overlapping. In these two separate filings, the Commission has been requested to issue declaratory orders concerning the proposed formation of two separate entities. Each request is accompanied by separate and unique governing documents. Consolidation would not enable the Commission or parties to more efficiently evaluate the issues, such as the independence of each different governance structure, presented in the separate proceedings. Indeed, consolidation of the proceedings could have the unintended consequence of slowing implementation, contrary to the Commission's goal to establish RTOs as soon as feasible.⁷

In their October 16, 2000 filing, the TransConnect Applicants also address certain functions that they envision TransConnect undertaking within the RTO West framework. However, the Transmission Operating Agreement contains provisions that relate to these functions. Thus, these provisions are appropriately addressed in this proceeding. The

⁷ Each of the TransConnect Applicants is independently involved in the RTO West proceeding. If TransConnect were delayed, this would not delay RTO West. RTO West could go forward even if TransConnect were not formed. However, if the proceedings are consolidated, a delay in one could potentially delay the other.

TransConnect companies do not seek approval of these Transmission Operating Agreement provisions in their separate filings. Thus, there is no reason to consolidate these filings in order for the Commission to address these Transmission Operating Agreement provisions.

For these reasons, the Filing Utilities request that the Commission deny the motions to consolidate.

IV. ANSWER TO CERTAIN PROTESTS AND COMMENTS

A. Scope of Answer to the November 20 Comments

The Filing Utilities believe that the Commission's understanding of the issues presented by the Filing Utilities' request for an expedited declaratory order will be aided if they address comments included within the November 20 Comments relating to three key issues:

(1) governance of RTO West, (2) the scope and configuration of RTO West, and (3) the Agreement Limiting Liability Among RTO West Participants (the "Liability Agreement"). This Answer addresses comments relating to these issues in sections IV.E., IV.F. and IV.G. below.

Additionally, the Filing Utilities are submitting a response to comments (1) concerning the Stage 2 process, (2) suggesting that an independent RTO West Board be established immediately, and (3) suggesting a cost-benefit analysis.

B. Matters Outside the Scope of this Answer

1. Stage 2 Issues

A large portion of comments raised by the November 20 Comments relate to documents to be created or issues to be resolved during Stage 2.⁸ As the Filing Utilities explained in the October 23 Filing, many important issues remain to be addressed during Stage 2, such as calculation of transfer charges and allocation of firm transmission rights; development of the terms and conditions of the RTO West Tariff (including details of congestion management and the transmission planning process); development of the Transmission Owner tariffs; resolution of seams issues with adjacent regions; and description of the market monitoring mechanism. It is generally premature to address comments on these and other Stage 2 issues.⁹ Order Nos. 2000 and 2000-A direct certain of the Filing Utilities to undertake a *voluntary* process to consider RTO formation within certain parameters established by the Commission.¹⁰ To the extent that the November 20 Comments address

⁸ Because the documents submitted in the October 23 Filing were only a subset of the materials needed to complete the proposal related to the formation of RTO West, the Compliance Filing was designated as a “Stage 1” filing. A “Stage 2” filing will include the balance of materials and information needed to complete the RTO West proposal and will be submitted to the Commission in spring 2001.

⁹ Several comments address the Stage 2 process itself. These comments can be broadly categorized in two groups: (1) transmission owners desiring to be treated in the same manner as Filing Utilities in Stage 2 of RTO West’s formation; and (2) commentators urging the Commission to address public involvement in Stage 2. Both types of comments merit a response and are addressed in section IV.C. below.

¹⁰ 31 FERC Stat. & Regs. ¶ 31,089, 31,033-34.

Stage 2 issues, the Filing Utilities will consider them in the course of their Stage 2 deliberations.¹¹

At the conclusion of Stage 2 in spring 2001, the Filing Utilities will make appropriate filings. Interested persons will have an opportunity to review the completed RTO West proposal and file supplemental protests. By then, many concerns relating to Stage 2 issues raised by the November 20 Comments are likely to be resolved. The Commission should therefore treat such comments as informational only. The Commission should not prejudge the resolution of Stage 2 issues before the Filing Utilities have an opportunity to complete their deliberations and prepare the necessary documents for the Commission's consideration.

2. Transmission Operating Agreement and Agreement to Suspend Provisions of Pre-Existing Transmission Agreements

The October 23 Filing requested that the Commission issue a declaratory order (on an expedited basis) with respect to: (1) the form of RTO West's First Restated Articles of Incorporation and Bylaws included with the filing, (2) the scope and configuration of RTO West as proposed in the filing, and (3) the form of Liability Agreement Among RTO West Participants included with the filing. October 23 Filing at 93. The October 23 Filing also included copies of the then-current form of Transmission Operating Agreement and the then-

¹¹ Moreover, the Stage 2 process will have public involvement, many issues will likely be addressed and resolved before reaching the Commission.

current form of Agreement to Suspend Provisions of Pre-Existing Transmission Agreements (the “Suspension Agreement”). October 23 Filing, Attachments S and U.

On December 1, 2000, the Filing Utilities submitted the amended agreements in two separate filings (the “December 1 Supplemental Filings”).¹² With these filings, Stage 1 of the RTO West Compliance Filing is complete.

Although the November 20 Comments contain many comments on the Transmission Operating Agreement and Suspension Agreement,¹³ because the Transmission Operating Agreement and Suspension Agreement have been revised, interested persons have not yet had an opportunity to protest or comment upon the complete Stage 1 filings. Consequently, the Filing Utilities have suggested that the Commission provide interested persons an opportunity to protest or comment on the revised Transmission Operating Agreement and Suspension Agreement before considering the Filing Utilities’ request for preliminary guidance regarding the acceptability of the concepts and specific provisions of the Transmission Operating Agreement and Suspension Agreement. After the comment period on the December 1 Supplemental

¹² Avista Corporation, Bonneville, Idaho Power Company, The Montana Power Company, PacifiCorp, and Puget Sound Energy, Inc. submitted an Amended Supplemental Compliance Filing and Request for Declaratory Order Pursuant to Order No. 2000. Sierra Pacific Power Company, Nevada Power Company, and Portland General Electric Company made a separate filing on December 1, 2000 indicating broad agreement with the terms of the Transmission Operating Agreement as amended, but urging the Commission to direct the Concurring Utilities to include analyses of export fees in their Stage 2 financial modeling of transfer charges.

¹³ Some of the issues raised by the November 20 Comments have been addressed by the December 1 Supplemental Filings; others have not.

Filings, the Filing Utilities will request leave to respond to the consolidated protests and comments relating to the amended agreements to the extent that a response will aid the Commission's understanding and resolution of the issues.

C. Answers to Comments Concerning the Stage 2 Process

1. The Filing Utilities Should Determine the Appropriate Stage 2 Process

BC Hydro comments that it should be allowed to participate on the same basis as the Filing Utilities in Stage 2 negotiations.¹⁴ The Filing Utilities are in the process of developing their Stage 2 work plan. The Filing Utilities note that the success of the process utilized in Stage 1 is evidenced by the fact that they and British Columbia entities were able to agree to a general framework for British Columbia participation as a guide to further deliberations and negotiations. (See October 23 Filing, Attachment H.) Nevertheless, as part of Stage 2 planning, the Filing Utilities intend to consider the unique issues raised by British Columbia participation and discuss with BC Hydro the manner of its participation in Stage 2.¹⁵ It would

¹⁴ Supplemental Comments of BC Hydro at 27 (Nov. 20, 2000) (dates of filing is provided only when a party made more than one filing). Powerex endorses BC Hydro's comments. Initial Comments and Motion to Intervene of Powerex Corp. at 4.

¹⁵ Deseret Generation and Transmission Co-Operative Inc. ("Deseret") also wants to participate in Stage 2 on the same basis as the Filing Utilities. Protest and Comments of Deseret at 3-7 (Nov. 20, 2000). Deseret's comments are under consideration, but it would be similarly counterproductive for the Commission to attempt to dictate the extent of Deseret's participation in Stage 2.

be counterproductive for the Commission to attempt to dictate the extent and manner of British Columbia participation in Stage 2.

The City of Seattle asks the Commission “to require the filing parties to continue with an open public process in the further public development of the ‘RTO West’ proposal, including the ability to review final drafts of the documents before they are submitted to the Commission.”¹⁶ The Filing Utilities intend to continue to assure public involvement in the process for creating RTO West consistent with the Commission’s principles, including providing an opportunity for public review and comment of documents such as the RTO West Tariff and Schedules proposed to be filed with the Commission. However, it is inconsistent with the *voluntary* process for the Commission to rule on the manner in which the Filing Utilities provide for public involvement during Stage 2.

2. A Requirement That All Future RTO West Filings Be Made by an Independent RTO West Board of Trustees Would Greatly Delay and Would Substantially Diminish the Chances for RTO West To Succeed

Some intervenors ask the Commission for an order that all future RTO West Filings be made not by the Filing Utilities, but by an independent RTO West Board of Trustees.¹⁷ Going

¹⁶ City of Seattle’s Motion to Intervene at 11. The Public Power Council (“PPC”) states that the process of technical workgroups and a representative policy body worked well and recommends that it be continued through the development of Stage 2 filing materials. PPC Motion for Leave to Intervene and Protest at 24.

¹⁷ The following have suggested that the Commission direct formation of an RTO West Board, (continued...)

further, these comments ask that the fully-negotiated Transmission Operating Agreement, Suspension Agreement, and Liability Agreement not be acted on by the Commission, but also be deferred to the Stage 2 filing for resubmission in a form developed by the RTO West Board of Trustees. The IPPs/Marketers assert that such a change in the procedure for completing the RTO West filing “would not result in any delay in the RTO West operations commencement date.”¹⁸

Substituting the RTO West Board of Trustees for the Filing Utilities would come at a high price in the form of delays and reduced chances of success of RTO West. The Filing Utilities have acted diligently to move RTO West forward. Representatives of the RTO West Filing Utilities made major commitments to the Stage 1 public process, which was continued for as long as possible consistent with the Commission’s RTO filing deadlines. The Filing Utilities then diligently worked to resolve those Stage 1 issues not resolved in the public process. This effort included both an additional public forum for reaction to preliminary determinations by the Filing Utilities and careful review and revision of draft filing documents based on extensive

¹⁷(...continued)

which would then implement the rest of the filings. Motion to Intervene and Comments of Wyoming Industrial Energy Users at 9; Motion to Intervene and Comments of Electric Power Supply Association at 7; Motion to Intervene and Protest of Northwest IPPs/Marketers Group at 5, 40-42.

¹⁸ IPPs/Marketers Motion at 42.

public comments on those drafts. Public involvement is also planned for the Stage 2 deliberations.¹⁹

Despite the assurances of the IPPs/Marketers that their proposal will not cause delay, major delays would be inevitable with the proposal. The Filing Utilities propose a concentrated public process with a goal of completing all elements of the RTO West filing by spring 2001. By contrast, the IPPs/Marketers' proposal would require, in sequence: (1) The Commission's order on the RTO West Articles and Bylaws, (2) the establishment of the member groups (including hearing any challenges to the self-selection of groups by members), designation of a selection committee, selection of a firm to screen potential RTO West trustees, and a major effort of that firm culminating in recommendations to the selection committee, and (3) election of trustees. This process realistically could not be completed before spring 2001 when the Filing Utilities plan to make their Stage 2 filing. Thereafter, the Board of Trustees would have to meet, conduct a search for and select an executive director, and become educated on the complex Stage 1 and Stage 2 issues.²⁰ Then, the IPPs/Marketers propose that not only all

¹⁹ The desire of the commentators to replace the ongoing public process with determinations by an RTO West Board of Trustees is largely an attempt to secure a reconsideration of certain issues already considered in Stage 1. For instance, the IPPs/Marketers would like to revisit issues relating to allocation of Firm Transmission Rights. Despite the adoption of many features in the RTO West Stage 1 proposal favorable to the IPPs/Marketers, a substantial majority of the members of the Regional Representatives Group strongly disagreed with proposals by the IPPs/Marketers related to the auctioning of Firm Transmission Rights needed to ensure service to retail loads, as well as to certain other proposals made by the IPPs/Marketers.

²⁰ In addition to the delay inherent in such a proposal, there is the additional hurdle relating to
(continued...)

Stage 2 issues, but also all Stage 1 issues as negotiated over a five-month period and as set out in the various documents filed to date in this docket be renegotiated before the new Trustees. The resulting timetable and delay in the completion date would be contrary to the Commission's goals.

Far more important, however, is that substitution of RTO West Board of Trustees for the Filing Utilities would dramatically diminish the chances of any successful completion of the RTO West effort. Unlike the situation in California, there is no state law compelling participants and state and provincial regulators to accept the decisions of RTO West Board of Trustees. Instead, the Filing Utilities must negotiate terms that (1) their own boards of directors will approve, (2) will gain acceptance from retail rate regulators in eight states (and potentially two Canadian provinces), and (3) satisfy the requirements that Bonneville independently determine the provisions of RTO West agreements that are needed to carry out its federal transmission system responsibilities. The Filing Utilities believe that it is highly unlikely that a set of agreements dictated by newly selected trustees of RTO West would allow the above conditions of implementation to be met.

D. Answer to Comments Concerning a Cost-Benefit Analysis

²⁰(...continued)

funding for such endeavors. It may not be prudent for the Filing Utilities to fund such extensive RTO West operations before completion of Stage 2 documents, approval by the Commission, utility approval to execute RTO West documents, and necessary approval by other regulators.

Several Intervenors/Protestors have asserted that the RTO West Filing Utilities should conduct and submit to the Commission a cost-benefit analysis that demonstrates that RTO West will create more benefits than costs.²¹ As some of these same protestors admit, however, the Commission's Order No. 2000 does not require such analysis in an Order No. 2000 compliance filing.²² In Order No. 2000, the Commission considered relative benefits and costs of RTO formation and concluded that the long-term benefits achieved by forming RTOs outweighed the costs. *See, e.g.*, Order No. 2000 at 31,017, 31,026. Moreover, the Commission reviewed the balance of costs and benefits in low-cost power states—such as some of those affected by the formation of RTO West—and concluded that RTOs should be formed even in those states. *Id.* at 31,210.

Analysis of particular costs or benefits may be appropriate at another time or in other forums. For example, individual Filing Utilities may need to perform public interest analysis as part of related state commission proceedings. Such analyses may include consideration of the benefits and costs of RTO West. Consequently, there will be more appropriate opportunities in

²¹ *See, e.g.*, Motion to Intervene Affiliated Tribes of Northwest Indians-Economic Development Corporation at 7-10; Protest and Comment of Idaho Consumer-Owner Utilities Association, et al., at 66; Motion to Intervene and Protest of the Public Power Council at 22; Springfield Utility Board's RTO West Comments at 3-5.

²² Protest and Comment of Idaho Consumer-Owner Utilities Association, et al., at 66 ("Although the Commission does not require utilities to include a cost-benefit analysis in their Order No. 2000 compliance filings . . .").

the future for evaluating various costs and benefits of RTO West components. A cost-benefit analysis is not necessary or appropriate in this docket.

E. Answer to Comments Concerning Governance

1. Membership Fee

A number of intervenors suggest that the \$1,000 annual fee for membership in RTO West be reduced. The Filing Utilities intended to strike an appropriate balance between commitment and inclusion with the \$1,000 RTO West annual membership fee. We believe the membership fee is appropriate, fair, and reasonable. However, based on comments from a variety of parties, the Filing Utilities are amenable to providing in the Bylaws that the Board of Trustees' authority to reduce or waive fees be expanded to include legitimate public interest participants upon the written request of such entities. If the Commission concludes that this modification is appropriate, the Filing Utilities can submit revised Bylaws in a compliance filing.

2. Board Advisory Committee

A number of intervenors criticized the structure of the Advisory Committee. For example, several intervenors suggest language be added relating to the purposes of the Advisory Committee and generally suggesting the role of the stakeholder Advisory Committee be strengthened.²³ The Filing Utilities believe the proposed Bylaws reasonably

²³ These included the Idaho Consumer-Owned Utilities Association, Idaho Energy Authority, Northwest Requirements Utilities, Pacific Northwest Generating Cooperative, Power Resource Manager
(continued...)

balance stakeholders' ability to participate in RTO West policy making with the needs for independence and efficient decision-making.²⁴ The Filing Utilities are also concerned that locking procedures into the Bylaws may hamper the Board of Trustees' ability to adopt procedures relating to public process and adjust them as needed.

3. TDU Class Voting

As is explained in the October 23 filing, the governance structure proposed by the Filing Utilities provides for a Board of nine trustees who are not only independent of any market participant, but independent of any stakeholder members of RTO West, whether or not they are market participants. Moreover, members of the Board of Trustees are selected from a slate of candidates produced by an executive search firm. Trustees are chosen by a 30-member Trustee Selection Committee, only six of whom are selected by the Major Transmitting Utilities Class. Other members of the Trustee Selection Committee are chosen by other membership classes, one of which is the Transmission Dependent Utilities ("TDUs"). In

²³(...continued)

LLP, Snohomish County PUD, Utah Associated Municipal Power Systems, and Western Public Agencies Group (collectively the "Consumer-Owned Utilities").

²⁴ In its November 1, 2000 Order in Docket No. EL00-95-000, the Commission also recognized that undue stakeholder control compromises the ability to operate a transmission system reliably and efficiently. 93 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,121, 61,359 (2000). Based upon the California experience, it appears excessive stakeholder influence is a recipe for gridlock and faulty decision-making. The Commission should not force RTO West to repeat the mistakes of other regions.

general, the commentors agree with this structure, but protests have been submitted concerning the selection of members of the Trustee Selection Committee by the TDU class.

Specifically, several intervenors criticized the voting rights structure within the TDU class arguing that the so-called “4-2” split compromises the independence of RTO West. The 4-2 compromise provides that four of the six members representing TDUs will be chosen on a one-vote-per-utility basis, and two of the six members will be chosen on a load-weighted basis. The Filing Utilities believe that this allocation of voting rights is appropriate.

As the protestors note, this compromise was crafted to deal with the unique situation of the distribution companies that will be left after the formation of the TransConnect ITC. Those distribution companies will be part of the TDU class. However, only after they have formed an ITC and divested their transmission assets would the existing transmission owning utilities be eligible to join the TDU class. While the six utilities that expect to join TransConnect may own passive interests in TransConnect, these interests will be designed to meet the independence requirement of Order No. 2000. Those utilities will not be permitted to exercise control of TransConnect, so if they are not permitted to have fair representation in the TDU class they will effectively be disenfranchised in the RTO West structure. The Filing Utilities believe the proposed voting structure appropriately balances the interests of various parties in the region, and does not compromise the independence of RTO West.

The Consumer-Owned Utilities assert that the proposal “repudiates the collaborative process that Order No. 2000 requires and that the Filing Utilities purport to have utilized.”²⁵ This is incorrect. The governance structure was developed by an extensive collaborative process, lasting several months. All parts of the proposal were extensively discussed and vetted throughout the region, and broad agreement was reached on most aspects of the governance structure. It is unfortunate that agreement was not reached on the TDU allocation issue, but the 4-2 compromise reflects a reasonable attempt to balance the interests of large and small members of this class.

The Consumer-Owned Utilities assert that the utilities proposing to form the ITC “are in all respects situated similarly to every other TDU”²⁶ suggesting that these large TDUs should be satisfied that their interests will be adequately represented by the Consumer-Owned Utilities, who would dominate the class in a one-vote-per-utility structure.²⁷ But there are significant differences in interest that merit consideration. These differences include not only differences in numbers of customers, but in size of their service areas, mix of power supply sources, and

²⁵ Protest and Comment of Idaho Consumer-Owned Utilities Association; Idaho Energy Authority; Northwest Requirements Utilities; Pacific Northwest Generating Cooperative; Power Resources Manager, LLP; Snohomish County PUD; Utah Associated Municipal Power Systems; and Western Public Agencies Group (Nov. 17, 2000) at 5.

²⁶ *Id.* at 12, 13.

²⁷ The utilities’ proposing to form the TransConnect make up only six of the expected more than 100 TDUs, even though they serve 40% of the customers in the region.

ownership structure. The views of both large and small TDUs, and investor-owned and public TDUs deserve fair representation. This is what the Filing Utilities have proposed.²⁸

4. Market Monitoring Unit

Several intervenors suggested that the Marketing Monitoring Unit be addressed in the Bylaws. Specifically, the Affiliated Tribes of Northwest Indians suggest that the head of the Market Monitoring Unit report directly to the Board of Trustees. The Filing Utilities agree that reports of the Market Monitoring Unit should be made to the Board of Trustees and that the head of the Market Monitoring Unit should have unimpeded access to the Board of Trustees. However, the Filing Utilities believe the Board of Trustees should have discretion to determine the day-to-day reporting relationships for the head of the Market Monitoring Unit. Thus, the Filing Utilities believe no change should be made.

5. Qualifications for the Board of Trustees.

The Consumer-Owned Utilities assert that the threshold financial criteria for qualification of candidates for the Board of Trustees are biased in favor of individuals with experience in large corporate entities. Contrary to the comment, the experience requirement for two-thirds of the Trustee nominees extends not only to publicly traded for-profit

²⁸ The Consumer-Owned Utilities also suggest the elimination of the language that provides ““those Members comprising 50% or more of the voting power in the [load-weighted] Member Sub-Class . . . shall not be permitted to vote in this Member Sub-Class.”” Consumer-Owned Utilities’ comments at 16. The requested elimination of this provision from the Bylaws is acceptable to the Filing Utilities. If the Commission concludes that this modification is appropriate, the Filing Utilities can submit revised Bylaws in a compliance filing to allow the exercise of such authority.

corporations, but to privately held or not-for-profit corporations and government entities as well.²⁹ Thus, the Filing Utilities believe that candidates with the type of experience that the Consumer-Owned Utilities apparently desire will qualify for selection as Trustees.

To cure the perceived problem, the Consumer-Owned Utilities propose that the threshold financial criteria be expanded to include individuals from organizations that have 5% of the gross book value of the assets operated by RTO West.³⁰ The threshold financial criteria in the Bylaws is that two-thirds of the nominees for selection as a Trustee have experience with an entity having revenues or an operating budget greater than or equal to 5% of the gross book value of the assets operated by RTO West. Bylaws, Article VI, Section 2, subsection (d). These criteria serve the purpose of ensuring that most of the Trustees have experience managing problems of business enterprises of a similar size to RTO West. The Filing Utilities believe that the goal of diversity of experience on the Board is achieved by providing that one-third of the candidates for Trustee need not come from larger enterprises.

6. Definition of “Affiliate”

The Consumer-Owned Utilities assert that the definition of “Affiliate” which contains an exception for utilities proposing to form an ITC should be modified to eliminate this exception. They argue that the exception will permit utilities that have formed an ITC to participate in the

²⁹ Proposed Bylaws, Article VI, Section 2, subsections (c) and (d).

³⁰ Consumer-Owned Utilities comments at 17.

TDU class at the same time as their affiliated ITC participates in the Major Transmitting Utility Class.³¹ The exception in the definition in the Bylaws provides that “in the case of any Person that is a public utility which owns an interest in an Independent Transmission Company (“ITC”) and has divested ownership of its electric transmission system, such Person and the Independent Transmission Company shall not be considered Affiliates.”³² Since the Commission’s independence guidelines preclude the companies who form an ITC from having control of the ITC, they are not affiliates in the traditional sense, and would not have representation in the Major Transmitting Utility Class. When TransConnect is formed as an ITC and the members have divested ownership of their transmission system, they will become transmission-dependent utilities, and should be entitled to participate in RTO West’s TDU class. Otherwise, these transmission dependent utilities will have no voice in RTO West even though they serve 40% of the customers in the RTO West region.

7. Conflict of Interest Issues.

The Consumer-Owned Utilities assert that the Bylaws leave a substantial gap in the prohibitions of Trustee financial dealings with entities having a financial interest in the operation of RTO West.³³ The proposed Bylaws for RTO West are more strict than the Commission’s

³¹ *Id.* at 24, 25.

³² Proposed Bylaws, Article I, Section 1.

³³ *Id.* at 27, 28.

requirements in that they limit financial interests by both market participants and other categories where perceived conflicts might arise.³⁴

The Bylaws also provide that the Audit Committee of the Board of Trustees must monitor compliance with the Codes of Conduct for both employees and members of the Board of Trustees “to ensure the Corporation’s independence and freedom from conflicts of interest” and is required to make regular reports to the Board of Trustees regarding such compliance.³⁵ The restrictions on financial interests together with the audit requirements were carefully considered by the Filing Utilities to protect against inappropriate conflicts of interests, while avoiding undue restrictions on the pool from which candidates for the Board of Trustees may be selected.³⁶

The Consumer-Owned Utilities also criticize the Employee Code of Conduct. Again, the Filing Utilities worked hard to prohibit inappropriate conflicts of interest. As noted above, the Audit Committee of the Board of Trustees is charged with compliance with conflicts-of-

³⁴ Bylaws, Article VI, Sections 13 and 14, and Exhibit B.

³⁵ Bylaws, Article VII, Section 2.

³⁶ For example, if the Consumer-Owned Utilities recommendation were adopted, no retail customer (or directors, officers or employees of commercial or industrial customers) exercising direct access rights under state law could qualify as a trustee.

interest standards. More importantly, should facts come to light that warrant changes, the Board of Trustees may amend the Employees Code of Conduct.³⁷

8. Public Purpose

The Oregon Office of Energy and others propose that the Bylaws include a public interest purpose.³⁸ While the Filing Utilities believe that public benefits will result from the establishment of an RTO, they do not believe it appropriate to modify the Bylaws to incorporate a public purpose standard. The stated purpose in the Bylaws of creating an RTO to meet the Commission's applicable requirements is sufficient.

9. Participation by Large End Users

The Industrial Customers of Northwest Utilities ("ICNU") and the Direct Service Industries (the "DSIs") argue that the Bylaws be revised to allow for either direct participation by large retail customers or representation by their trade organizations. The Bylaws provide for direct participation by large and small end users, including members of ICNU and the DSIs. Trade organizations are free to join the Unaligned Entities Class.

The Bylaws provide that one member of the Trustee Selection Committee for the Large Retail Customer Class shall be a representative of a Scheduling Coordinator. ICNU and the

³⁷ Bylaws, Article VIII, Section 14.

³⁸ Motion to Intervene and Protest of the Oregon Office of Energy (dated Nov. 18, 2000) at 4; Motion to Intervene of the Affiliated Tribes of the Northwest-Economic Development Corp. at 17; Motion to Intervene and Protest of Public Interest Organizations at 14-15.

DSIs want all four Trustees' Selection Committee seats allocated to the Large Retail Customers to be retained in the event there are no Large Retail Customers that are Scheduling Coordinators.³⁹ The Filing Utilities are amenable to making this change to the RTO West Bylaws. If the Commission concludes that this modification is appropriate, the Filing Utilities can submit revised Bylaws in a compliance filing to allow the exercise of such authority.

F. Answer to Comments on the Scope and Configuration of RTO West

1. Summary of Comments on Scope and Configuration

The November 20 Comments contain significant support for the proposed RTO West scope and configuration.⁴⁰ However, some intervenors criticized the proposed RTO West scope and configuration. Several argued that the geographic scope should be smaller;⁴¹ several

³⁹ Protest of the Industrial Customers of the Northwest Utilities and the Direct Service Industries at 6.

⁴⁰ See, for example, comments of Northwest Power Planning Council, the Electric Power Supply Association, Morgan Stanley, and the Washington State Office of Trade and Economic Development.

⁴¹ The Springfield Utility Board ("Springfield") argues that smaller scale systems are better able to react to local concerns and that the proposed RTO West scope will diminish this flexibility. The Public Generating Pool suggests that RTO West include only facilities within Washington, Oregon, Idaho, and western Montana because of market boundary and reliability needs. A number of commentators suggest Nevada Power should not participate in RTO West. *See, e.g.*, Comments of Southern Nevada Water Authority, Valley Electric Association, and Public Power Council.

others argued that RTO West should be larger.⁴² Some intervenors commented on the desirability of Bonneville's participation in RTO West.⁴³

2. Answer to Comments on Scope and Configuration

The Commission described several factors that should be used to assess the appropriate scope and configuration of an RTO. These factors include a scope that permits RTO West to perform its functions effectively and supports efficient and nondiscriminatory power markets.⁴⁴ The Commission has stated that an RTO that is of large geographic size is most important for supporting efficient, open power markets.⁴⁵ The size of the RTO must also

⁴² Powerex suggests that the Commission consider a "West-wide RTO." Comments of Powerex at 9. Modesto Irrigation District argues the Commission should analyze electricity markets as a substantially integrated whole. Modesto Motion at 5. Williams Companies strongly encourage RTO West to continue its efforts to expand the RTO's coverage into British Columbia and Alberta. Motion of the Williams Companies at 10.

⁴³ The Electric Power Supply Association supports Bonneville's participation, but several intervenors voice concern. Springfield believes Bonneville's participation will allow other regions to "hijack" Bonneville's superior resources and threatens Bonneville's ability to meet its fish and wildlife, treaty, and bond obligations. The Affiliated Tribes of NW Indians-Economic Development Corporation also indicated concern that Bonneville's ability to adequately address fish and wildlife issues remained to be resolved.

⁴⁴ The Commission also concluded that all or most of the transmission facilities in a region must be included in the RTO and that the RTO must have operational authority over the facilities under its control. A number of intervenors criticized various aspects of the description of what facilities will be included or excluded in RTO West. Additionally, Consumer-Owned Utilities suggest RTO West may not control an appropriate scope and configuration of critical facilities within its geographic area. Consumer-Owned Utilities Protest and Comment at 6. However, they otherwise believe that the geographic scope and configuration should be approved. The Transmission Operating Agreement defines and will specify what facilities will be included or excluded. As noted above, the Filing Utilities expect to respond to comments relating to issues addressed in the Transmission Operating Agreement after interested persons have had an opportunity to comment further on the revised documents in the December 1 Supplemental Filings.

⁴⁵ 31 FERC Stats. & Regs. ¶ 31,089, 31,083.

be sufficiently large to permit efficient congestion management as well as planning and coordination of transmission expansion, among other functions. RTO West satisfies these concerns. Moreover, the Filing Utilities urge the Commission to honor the *voluntary* nature of its RTO formation initiative by deferring to the reasonable judgment of the Filing Utilities with respect to the appropriate size and boundaries of the RTO. The Filing Utilities believe that the October 23 Filing provides adequate grounds for the Commission to find that the RTO West scope and configuration are reasonable. (*See* October 23 Filing at 61, and Attachments.) However, additional comments that may aid the Commission in its deliberations are set forth below.

RTO West covers the transmission systems of all major transmission owners located within the U.S. portion of the Northwest Power Pool. It is designed to reasonably accommodate the addition of facilities of other transmission owners, including nonjurisdictional entities, within the Western Systems Coordinating Council area. The proposed boundaries of RTO West encompass a significant contiguous geographic region ranging from the southern tip of the state of Nevada to the Canadian border and potentially parts of Canada, and from the Pacific Ocean to the Rocky Mountains.

RTO West will support efficient markets. It will link the major trading hubs of the West. It encompasses the Filing Utilities' transmission facilities at the major energy trading hubs at the California-Oregon border, Nevada-Oregon border, and mid-Columbia trading hub and

interfaces at the Canadian border and the Mead/Four Corners area of the Southwest Power Pool; it links to the Palo Verde trading hub as well.

The practical effect of the RTO West proposal is to:

- (I) Create one of the largest RTOs in North America;
- (ii) Operate under a single, uniform wholesale transmission tariff covering a large portion of the West;
- (iii) Operate under a single set of RTO West business practices that would be applied on a broad, regional basis; and
- (iv) Reduce the number of control areas in the western United States.

This framework advances the Commission's goal of a large regional organization operating the grid for the benefit of both reliability and markets. The intervenors who argue that RTO West is too large have not demonstrated that reliability or market efficiency would be enhanced by breaking up RTO West. The desire to have a smaller organization more focused on the interests of a particular four-state region are inconsistent with the Commission's purposes.⁴⁶

⁴⁶ Several parties challenge the inclusion of Nevada Power Company in RTO West. In addition to the market and operational efficiencies of a larger RTO, the Filing Utilities urge the Commission to consider the desire of jointly owned Sierra Pacific Power Company and Nevada Power Company to participate in one RTO and the resulting administrative efficiencies. Because Nevada Power Company currently operates its own control area, neither operational difficulties nor additional seams will be created by its participation in RTO West. The Filing Utilities also believe the incremental cost of including Nevada Power Company would be relatively small given the fact that operational hardware and software must be installed with
(continued...)

The intervenors who argue that RTO West is too small have also failed to make the case that the RTO West filing should be disrupted. For instance, Powerex suggests that the Commission encourage a West-wide RTO.⁴⁷ The Filing Utilities concur that this is a laudable long-term goal. But integration of the RTO West region with the other RTOs in the West is infeasible at this time and would face near universal rejection in the RTO West region.

The Public Generating Pool argues that RTO West is too small in another respect, in that they argue it does not have adequate provision for nonjurisdictional entities.⁴⁸ The Filing Utilities disagree that nonjurisdictional entities may not join RTO West. As is described in the October 23 Filing, the Filing Utilities went to extended efforts to accommodate such entities and allow for their entry into RTO West. Specific concerns about the provisions that impact such entities arise from the language in the Transmission Operating Agreement. As noted elsewhere in this pleading, the Filing Utilities are not addressing Transmission Operating Agreement issues at this time and will instead address them after the parties have had an opportunity to address the December 1, 2000 revisions to the Transmission Operating Agreement.

⁴⁶(...continued)

sufficient capacity to accommodate growth in market participants, load, and other factors. By spreading the uplift charges over a larger load, the uplift charge per unit of power consumed should decline, not increase. Thus, including Nevada Power Company and potentially other participants in RTO West should tend to reduce the per-unit uplift charge and thereby promote efficiency as long as adding additional participants does not lead to large investment in fixed costs.

⁴⁷ Initial Comments and Motion to Intervene of Powerex Corp. at 6, 9.

⁴⁸ Public Generating Pool Protest and Comments at 17 (Nov. 20, 2000).

In conclusion, the Filing Utilities have effectively satisfied the scope and configuration characteristic of the Final Rule. The RTO West proposed scope and configuration is reasonable and should be approved.

G. Answer to Comments on RTO West Liability Agreement

Comments concerning the RTO West Liability Agreement were submitted by ICNU, the DSIs, Dynegy, Deseret, Affiliated Tribes of Northwest Indian Economic Development Corporation (the “Affiliated Tribes”), the Public Utilities Commission of Nevada (the “PUCN”), and the Washington Utilities and Transportation Commission (the “WUTC”).

As correctly reflected in supportive comments of the WUTC, resolution of liability issues affects the willingness of transmission owners to agree to participate in RTO West. The WUTC asks that “the Commission . . . clarify its view of whether these provisions are appropriate and acceptable in the formation of an RTO.”⁴⁹ In Order No. 2000-A, the Commission recognized that it was appropriate to have liability issues resolved before the commencement of operations.⁵⁰

The Filing Utilities propose that RTO West protect itself from protracted liability disputes by adopting the essential terms of the Western Interconnected Systems Agreement (the “WIS Agreement”) which has limited the liability of electric system owners in the region for

⁴⁹ Comment of WUTC at 12.

⁵⁰ Order No. 2000-A at 31,092.

the past 30 years. Similar to the approach taken in the WIS Agreement, the Filing Utilities propose that RTO West maintain insurance coverage in a minimum amount of \$150 million in general liability and an additional \$150 million in errors and omission coverage for its operations. However, as correctly noted by the PUCN, the adequacy of such insurance, together with its cost to ratepayers, and potentially its availability, is dependent upon acceptance of the limitations on liability sought with this agreement.⁵¹ By so doing, the Filing Utilities seek preservation of the status quo and price stability in the region. The proposal also provides for parity with public power agencies within the region that would otherwise be protected from liability by operation of sovereign immunity.

ICNU and the DSIs, in a joint filing, take issue with such proposed limitations on liability, suggesting that such are “in excess of current law,” “overbroad,” and nonreflective of the concerns of regional non-transmission-owning parties, including end-use customers. On the contrary, the Filing Utilities proposal reflects a broad regional consensus, including transmission owners, state utility commissions, and most market participants, that preserves the status quo of the WIS Agreement and protects both utilities and their native loads from being exposed to significant new liability as a result of the creation of a region-wide RTO. Tariff limitations of

⁵¹ RTO West further urges the adoption of Continuity of Service Tariff limitations of liability as a condition of Commission approved tariff rates in a manner consistent with the approach taken by the large majority of state utility commissions in approving rates of investor-owned utilities in the region. *See* Liability Agreement ¶ 3.2; *accord* Portland General Electric Co. Rule C (2), P.U.C. Oregon No. E-16 (Mar. 30, 1995); Avista Rule 16, WN U-26 (Mar. 2, 1987); Puget Sound Energy Electric Tariff G, WN U-60 (Jan. 6, 2000).

liability, while varying in language and format, have generally provided that utilities shall not be liable to customers for service interruptions except in cases of willful misconduct or gross negligence.⁵² It has been stated that courts are “virtually unanimous” in holding that these tariff limitations not only keep rates low, but also recognize that the customers most vulnerable to interruptions are in the best position to protect themselves through back-up generation.⁵³ It has also been recognized that, given the imagination and resourcefulness of today’s litigants and absent tariff protection, damages resulting from a single interruption of service event could result in plaintiffs owning the utility or the imposition of astronomical rates to recoup liability payments.⁵⁴ The Commission itself has evidenced a long-standing practice of accepting tariff

⁵² *E.g., Olson v. Mountain States Telephone & Telegraph Co.*, 580 P.2d 782 (Ariz. Ct. App. 1978); *Waters v. Pacific Telephone Co.*, 523 P.2d 1161 (Cal. 1974); *Professional Answering Service, Inc. v. Chesapeake & Potomac Telephone Co.*, 565 A.2d 55 (D.C. 1989); *Landrum v. Florida Power & Light Co.*, 505 So. 2d 552 (Fla. Dist. Ct. App.); *Southern Bell Telephone & Telegraph Co. v. Invenchek, Inc.*, 204 S.E.2d 457 (Ga. Ct. App. 1974); *In re Illinois Bell Switching Station Litigation*, 641 N.E.2d 440 (Ill. 1994); *Singer Co. v. Baltimore Gas & Electric*, 558 A.2d 419 (Md. Ct. Spec. App. 1989); *Wilkinson v. New England Telephone & Telegraph Co.*, 97 N.E.2d 413 (Mass. 1951); *Valentine v. Michigan Bell Telephone*, 199 N.W.2d 182 (Mich. 1972); *Computer Tool & Engineering v. Northern States Power Co.*, 453 N.W.2d 569, 572 (Minn. Ct. App. 1990); *Warner v. Southwestern Bell Telephone Co.*, 428 S.W.2d 596 (Mo. 1968); *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588 (Nev. 1992); *Lee v. Consolidated Edison*, 413 N.Y.S.2d 826 (N.Y. Sup. Ct. 1978); *In re Investigation into Limitation of Liability Clauses Contained in Utility Tariffs*, No. 85-1406-AU-COI, Policy Statement at ¶ 4 (Ohio PUC 1987); *Garrison v. Pacific Northwest Bell*, 608 P.2d 1206 (Or. 1980); *Behrend v. Bell Telephone Co.*, 363 A.2d 1152 (1976), *vacated*, 374 A.2d 536 (1977), *reinstated*, 390 A.2d 233 (Pa. 1978); *Pilot Industries v. Southern Bell Telephone Co.*, 495 F. Supp. 356 (D.S.C. 1979); *Southwestern Bell Telephone Co. v. Rucker*, 537 S.W.2d 326 (Tex. Civ. App. 1976); *Re Liability Limitations, Disclaimers or Indemnity Provisions in Telecommunications Tariff Filings*, 137 Pub. Util. Rep. 4th 436 (W. Va. Pub. Serv. Comm’n 1992); *Schaafs v. Western Union Telegraph Co.*, 215 F. Supp. 419 (E.D. Wis. 1963); *Burdick v. Southwestern Bell Telephone Co.*, 675 P.2d 922, 925 (Kan. Ct. App. 1984).

⁵³ *See Garrison v. Pacific Northwest Bell*, 608 P.2d 1206, 1211 (Or. Ct. App. 1980).

⁵⁴ *See, e.g., Illinois Bell Switching Station Litigation*, 64 N.E.2d 440 (Ill. 1994).

provisions limiting utility liability to gross negligence, willful misconduct, or even greater limitations on liability.⁵⁵ This is in contrast to disapproval of requirements for indemnification for a Party's own negligence.⁵⁶

The Filing Utilities submit that their effort seeks to preserve the status quo. They also seek to provide an appropriate balance between the liability risks assumed by RTO West and its constituent members and the liability risks assumed by the customers of RTO West. Electric

⁵⁵ See, e.g., *Rochester Gas and Electric Corp.*, 33 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,317 (1985); *Rochester Gas and Electric Corp.*, 26 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,115 (1984); *Central Maine Power Co.*, 65 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,192 (1993); *American Electric Power Service Corp.*, 64 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,279, *modified on other grounds*, 67 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,168 (1993) (the Commission set liability limitation for hearing implying no definitive policy on gross negligence standard); *Consumers Power Co.*, 59 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,106 (1992); *Cambridge Electric Light Co.*, 72 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 63,017 (1995) (ALJ's decision accepting reciprocal provisions limiting liability to gross negligence); *Municipal Light Boards of Reading and Wakefield*, 53 F.P.C. 1545 (1973); Consolidated Edison of NY, Inc. Rate Schedules Nos. 117, 119-22, 134, 136, 143, 157-58, 164, 170, 177-79; New York State Electric & Gas, Corp. Rate Schedules, FERC Nos. 128, 165, 181, 191; New England Power Co., vols. 3, 4 FERC Electric Tariffs (company not responsible for "any interruption or failure").

In *Northeast Energy Associates v. Boston Edison*, 91 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,069 (2000) (Docket No. EL00-50-000), the Commission indicated that an "interconnection agreement" between the parties could lawfully limit the liability of Boston Edison for reimbursement of \$3.7 million in "lost opportunity costs" when it temporarily disconnected Northeast Energy's generation plant to accommodate the connection of ANP Blackstone Energy Company's 615 MW generating station. The Commission's holding relied upon a contract provision stating, "Neither party . . . shall be liable to the other party . . . for claims for incidental, indirect or consequential damages connected with or resulting from performance or nonperformance of this Agreement, including, without limitation, claims in the nature of replacement power, lost revenues, income or profits, reduction in or loss of power generation or equipment used therefor unless caused by gross negligence or willful misconduct."

⁵⁶ Order on Rehearing, *New York System Operator, Inc.* at 8 (Apr. 4, 2000) (citing by example to *Alabama Tennessee Natural Gas Company*, 48 F.P.C. 774, 780 (1972)); see also, *Transmission Access Policy Study Group v. F.E.R.C.*, 225 F.3d 667 (D.C. Cir. 2000) (wherein Commission asserted that its rulemaking on Order 888 was more limited and directed to limitations on indemnification). In the context of this regional, consensus-based agreement, the Commission should not apply the analysis it applied in considering indemnification provisions in Order No. 888.

service is vital to the operations of the American economy, and interruptions in service can cause significant economic damage. Nevertheless, electric service is not, and never will be, free of service interruptions. Imposing the bulk of the liability risks from service interruptions upon electric providers will force those providers to incur all of the costs of insuring against damages resulting from interruptions in electric service. Such an imposition of liability risk, in turn, will significantly increase the cost of electric service and may well render insurance unavailable at any cost.

Dynegy specifically objects to the provisions of the RTO West Liability Agreement addressing RTO West's liability for Wrongful Dispatch Orders as that term is defined in the Liability Agreement. Specifically, Dynegy asserts that the RTO West Liability Agreement does not allow parties to recover full opportunity costs as damages for a Wrongful Dispatch Order.

The response to this objection is similar to the response to the objections raised by ICNU and the DSIs. As an initial matter, the RTO West Liability Agreement does allow generators recourse against RTO West for the costs of replacement power and lost sales revenue under paragraphs 8.2.2.1–8.2.2.4. Moreover, the RTO West Liability Agreement requires no indemnification except in the limited and unrelated case of Contact Claims. Instead of a speculative measure of “lost opportunity cost” for Wrongful Dispatch Orders it substitutes an objective measure of damage as measured by reference to the Mid-Columbia Dow Jones daily on-peak or off-peak price less described costs. The Filing Utilities further submit that

each generator is in a better position than RTO West to anticipate and insure against any extraordinary damages. For these reasons, the liability limitations in the RTO West Liability Agreement represent an appropriate balance of risks between RTO West and individual generators. Compensation for lawful redispatch orders (as distinguished from Wrongful Dispatch Orders) will be addressed in the RTO West tariff and will fully comply with the Commission's pronouncements in Order No. 2000.

Affiliated Tribes and Deseret take issue with the appropriateness of acceptance of liability by RTO West in paragraph 4.3 of the Liability Agreement for Contact Claims arising from the system design or condition of any Electric System facilities that it operates pursuant to a Transmission Operating Agreement. Specifically, Affiliated Tribes and Deseret argue for RTO West not to assume liability for Contact Claims that occur at a point on an Electric System other than on the indemnified Party's own generation or distribution system. The Filing Utilities submit that this assumption of liability is entirely appropriate given RTO West's oversight, control and operation of the interconnected transmission system. RTO West will have responsibility for determining the need for design changes for the interconnected system and should have corresponding responsibility for any present inadequacies in oversight, design, and operation of interconnected transmission systems over which it assumes control. Liability insurance will be in place to respond to such contingencies.

V. CONCLUSION

For all the reasons set forth above, the Filing Utilities request that the Commission:

1. Deny the motion to consolidate this RTO West docket and the ITC docket;
2. Grant the Filing Utilities' request to waive the rule prohibiting answers to protests and consider this Answer to the extent it aids the Commission in its deliberation and decision;
3. As soon as possible after the Filing Utilities submit their answer to comments on liability on December 15, 2000, issue an expedited declaratory order pursuant to 18 C.F.R. § 35.34(c)(3) that:
 - a. The proposed governance structure of RTO West as set forth in its Articles of Incorporation and Bylaws satisfies the independence characteristic of an RTO as set forth in 18 C.F.R. § 35.34(j)(1) and that the proposed Articles of Incorporation and Bylaws of RTO West otherwise meet the Commission's RTO policy;
 - b. The proposed scope and configuration of RTO West as set forth in this application would satisfy the scope and regional configuration characteristic of an RTO as set forth in 18 C.F.R. § 35.34(j)(2);
 - c. The proposed liability and insurance structure as set forth in the Agreement Limiting Liability Among RTO West Participants would be appropriate as part of arrangements otherwise acceptable to the Commission for creating RTO West and is consistent with the requirements of Order No. 2000; and

4. After interested persons have had an opportunity to protest or comment further on the revised Transmission Operating Agreement and the Suspension Agreement included in the December 1 Supplemental Filings and the Filing Utilities have had an opportunity to answer if they have good cause to do so, review the Transmission Operating Agreement and the Agreement to Suspend Provisions of Pre-Existing Transmission Agreements submitted to the Commission on December 1, 2000 and provide preliminary guidance regarding the acceptability of the concepts and specific provisions they contain, subject to revisions necessary (if any) to conform these agreements to the Filing Utilities' Stage 2 filing.

SIGNATURES

DATED this 5th day of December, 2000.

AVISTA CORPORATION

PACIFICORP

By _____
Randall O. Cloward
Director, Transmission Operations

By _____
Donald N. Furman
Vice President, Transmission Systems

BONNEVILLE POWER
ADMINISTRATION

PORTLAND GENERAL ELECTRIC

By _____
Mark W. Maher
Senior Vice President
Transmission Business Line

By _____
Stephen R. Hawke
Vice President System Planning
And Engineering

IDAHO POWER COMPANY

PUGET SOUND ENERGY, INC.

By _____
James M. Collingwood
General Manager, Grid Operations
And Planning

By _____
Kimberly Harris
Assistant General Counsel

THE MONTANA POWER COMPANY

NEVADA POWER COMPANY and
SIERRA PACIFIC POWER COMPANY

By _____

By _____

William A. Pascoe
Vice President, Transmission

Gary Porter
Executive Director Transmission